IN THE

Supreme Court of the United States

No. 70-75

MOOSE LODGE No. 107,

Appellant,

—v.—

K. LEROY IRVIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

JOHN T. RIGBY
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae
Lawyers' Committee for
Civil Rights Under Law

IN THE

Supreme Court of the United States

No. 70-75

MOOSE LODGE No. 107,

Appellant,

—v.—

K. LEROY IRVIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Motion for Leave to File Brief *Amicus Curiae*

The Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file the attached brief *Amicus Curiae*. The Committee supports affirmation by the Court of the decision of the lower court that the grant by the State of Pennsylvania to Moose Lodge No. 107 of a club liquor license was in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Lawyers' Committee for Civil Rights Under Law is organized as a not-for-profit corporation. Partly through a paid staff, but primarily through the volunteer services of members of the private bar, the Committee actively assists citizens in asserting and enforcing their civil rights. The thrust of the Committee's activities is to seek for these citizens the full measure of the protection of the law against racial discrimination.

The Committee maintains ten offices throughout the United States as well as a national headquarters in Wash-

ington, D.C. A Board of Trustees of some one hundred lawyers guides the national activities of the Committee, with smaller boards or steering committees directing the local offices. The membership of the national Board of Trustees represents a cross-section of the American bar, as do the hundreds of attorneys who have volunteered to handle civil rights cases under the auspices of the Committee since its inception in 1963. Participants in Committee activities include single practitioners as well as the range from young associates to senior partners in law firms of all sizes. The Committee numbers among its national and local members fifteen presidents of the American and National Bar Associations, including both incumbents, and two former Attorneys General of the United States.

The Committee has requested consent by Appellant and Appellee to the filing of a brief *Amicus Curiae*. Appellee has not consented. Appellant has declined to consent. The Committee, therefore, moves pursuant to Rule 42(3) for leave to file the annexed brief *Amicus Curiae*.

1. The interest of the Committee in this case arises from its dedication to and interest in implementation of Constitutional guarantees of civil rights. As described above, the Committee has for the past eight years been an active participant in this nation's effort to eradicate the stain of racial discrimination.

2. The Committee proposes, in its brief *Amicus Curiae*, to address itself to a matter of immediate and major interest to the Committee, that is, the Court's standards for determining whether the Equal Protection Clause of the Fourteenth Amendment precludes a State from granting a liquor license to an organization which engages in racial discrimination. In the event that the Court accepts juris-

diction in this case, decision by the Court on the merits will no doubt mark a major step in the evolution of the law concerning the implications of State involvement in private acts of racial discrimination.

3. The Committee believes that the decisional criteria employed by the lower court, and the thrust of Appellee's argument, would, if adopted by the Court, lead to an unacceptably quantitative standard for ascertaining the existence of State action prohibited by the Equal Protection Clause. The Committee believes that its interests in the outcome of this litigation can be adequately represented only if the Court considers the argument that the Equal Protection Clause of the Fourteenth Amendment prohibits a State from taking action, other than to discharge a governmental responsibility owed to all of its citizens, that has the effect of authorizing or enhancing private discrimination. The Committee understands that Appellee does not propose to make this argument to the Court. Thus, the interests of the Committee will not be adequately represented unless the Committee is granted leave to file the annexed brief.

Respectfully submitted,

JOHN T. RIGBY
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae
Lawyers' Committee for
Civil Rights Under Law

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

No. 70-75

MOOSE LODGE No. 107,

Appellant,

—v.—

K. LEROY IRVIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

This brief is submitted by the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae*.

INTEREST OF *AMICUS*

The Lawyers' Committee for Civil Rights Under Law is organized as a not-for-profit corporation. Partly through a paid staff, but primarily through the volunteer services of members of the private bar, the Committee actively assists citizens in asserting and enforcing their civil rights. The thrust of the Committee's activities is to seek for these citizens the full measure of the protection of the law against racial discrimination.

The Committee maintains ten offices throughout the United States as well as a national headquarters in Washington, D.C. A Board of Trustees of some one hundred

lawyers guides the national activities of the Committee, with smaller boards or steering committees directing the local offices. The membership of the national Board of Trustees represents a cross-section of the American bar, as do the hundreds of attorneys who have volunteered to handle civil rights cases under the auspices of the Committee since its inception in 1963. Participants in Committee activities include single practitioners as well as the range from young associates to senior partners in law firms of all sizes. The Committee numbers among its national and local members fifteen presidents of the American and National Bar Associations, including both incumbents, and two former Attorneys General of the United States.

The interest of the Committee in this case arises from its dedication to and interest in implementation of Constitutional guarantees of civil rights.

STATEMENT

Amicus agrees with the proposition, as stated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task.'" The potential range of the Court's inquiry for discerning state action in violation of the Equal Protection Clause was described by Mr. Justice Frankfurter in his separate opinion in *Terry* v. *Adams*, 345 U.S. 461, 473 (1953):

> "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power . . . ."

The unavailability of "readily applicable formulae" has led the Court, in assessing nonobvious involvement of the

State in private conduct, to engage in "sifting the facts and weighing the circumstances" to determine whether the Equal Protection Clause has been violated. *Burton, supra,* 365 U.S. at 722, 725. *Amicus,* in these terms, wishes to address itself to the dimensions of the sieve and the scale which may be employed in this process.

ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment Prohibits a State From Taking Any Action, Other Than to Discharge a Governmental Responsibility Owed to All of Its Citizens, That Has the Effect of Authorizing or Enhancing Private Discrimination.

I.

This case involves implementation of a State liquor regulatory and licensing scheme which has the effect of sustaining a private fraternal organization which, in its membership and guest policies, engages in racial discrimination. The State of Pennsylvania consciously authorized Moose Lodge No. 107, while reaping the economic benefits of a valuable grant extended by the State, to make a discriminatory classification based on color.

The question before the Court is not whether the Moose Lodge or its members may, individually or jointly, engage in acts of racial discrimination.[1] Nor, *Amicus* submits, is the question merely whether the relevant activities of the State of Pennsylvania, through its liquor licensing and

[1] The *Civil Rights Cases*, 109 U.S. 3 (1883), "embedded in our constitutional law" the principle that the Equal Protection Clause "erects no shield against *merely* private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948) (emphasis added); *Burton, supra*, 365 U.S. at 721.

regulatory process, are sufficient in frequency and magnitude, to make the State an unconscious partner or actual participant in the discriminatory practices of the Moose Lodge. *Amicus* suggests that the Equal Protection Clause precludes a State from undertaking *any* affirmative action, other than to discharge a governmental responsibility owed to all of its citizens, that has the effect of authorizing or enhancing private discrimination.

II.

There can be no question that we are here dealing with "state action". The State has acted. It has enacted a liquor code, under authority recognized by the Twenty-first Amendment.[2] In implementation of this enactment, the State has extended to a private organization—racially exclusionary in its membership and guest policies—the valuable authority to sell liquor by the drink. The State itself could not form and operate a club which discriminated against individuals on the ground of their race. The question, of course, is whether the State's action here was such as to warrant attribution to the State of the private club's discriminatory practices. As in *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 722, and *Reitman* v. *Mulkey,* 387 U.S. 369, 378 (1967), this case presents an instance of "nonobvious involvement of the State in private conduct."

---

[2] Under the Twenty-first Amendment, a State has "full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it goes there . . . ." *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945); *Joseph Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 42 (1966). The Court has described "commerce in intoxicating liquors" as commerce "over which the Twenty-first Amendment gives the States the highest degree of control." *Nippert* v. *Richmond*, 327 U.S. 416, 425 n. 15 (1946).

There is no requirement that the State involvement in private action, to be violative of the Equal Protection Clause, "be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *United States* v. *Guest*, 383 U.S. 745, 755-56 (1966) (citations omitted); *Terry* v. *Adams, supra:* Nor is it necessary here to show that the State enactment or action is itself racially motivated. As stated in *Palmer* v. *Thompson*, —— U.S. ——, 91 S.Ct. 1940, 1945 (1971), the focus is properly "on the actual effects of the enactments." Here, the effect of the enactment, as implemented by the State itself, was not only to authorize private racial discrimination but, in fact, to provide the economic underpinning for the discrimination. (See Jurisdictional Statement, p. 18; A 19-20, 25)

III.

The court below utilized essentially quantitative measures to determine whether equal protection of the laws has been denied to Appellee Irvis by the State. The court relied primarily on the "all-pervasiveness" of the Pennsylvania Liquor Code to conclude that the State, in the terms of *Burton, supra,* has "insinuated itself into a position of interdependence" with its private club licensees. (A 34)

Because of the likely effect of this case on other litigation now under way in State and Federal courts involving State roles in aid of private acts of racial discrimination,[3]

[3] As suggested by Mr. Justice Blackmun in his concurring opinion in *Palmer* v. *Thompson, supra*, 91 S.Ct. at 1947: "In isolation this litigation may not be of great importance; however, it may have significant implications." Numerous examples of related litigation

Amicus urges that the Court take pains to avoid resting its decision in this case on a primarily quantitative assessment of the relevant State role or action. However "pervasive" may be the interaction of the State and the private roles in the discriminatory scheme, it suffices that the State exercised its discretion to extend a valuable privilege in support of what the State must have known to be racially discriminatory acts.

The Twenty-first Amendment did not have the effect of recognizing a right of individuals or organizations to dispense liquor for pay. Rather, the Twenty-first Amendment restored to the States their comprehensive authority to regulate intra-state liquor commerce as they deemed appropriate. See n. 2, *supra*. A liquor license—particularly one entailing the opportunity to profit from the sale of liquor—is unquestionably a privilege, and not a right. Appellant has stipulated in this case that "the receipt and ownership of such a license is a valuable privilege granted to a club" by the State. (A 25, 4) Grant of such a privilege is an act of discretion by the State.

Appellant has sought to reduce to an absurdity the lower court's application of Equal Protection prohibitions to Pennsylvania's extension of liquor dispensing privileges to the Moose Lodge. Appellant suggests, for example, that the lower court's ruling would require the recipient of a marriage license to accept any person as a spouse, regardless of race and regardless of the license recipient's choice. Appellant argues that it is no less prohibited "state action" to license a marriage in which the participants engage in racial discrimination than it is to extend the

---

are set forth in Appellant's Memorandum In Opposition to the Motion to Affirm (pp. 3-4) and in the *Amicus* briefs filed in support of Appellant.

privileges of liquor sales to a racially discriminating fraternal organization.

Appellant's argument is but an extreme postulation of the proposition: "Is it prohibited state action to furnish public utilities, or police and fire protection, which has the effect of sustaining private racial discrimination?" The answer lies in the distinction between State activities, in the nature of grants or services, which by law or tradition the State is bound to furnish to all citizens, and those State grants which are in the nature of privileges.[4] A liquor license, under the Pennsylvania statute, falls in the latter category.

There is no Constitutional or Federal statutory provision imposing an affirmative duty on the State to authorize private sales of liquor. Nor is the authorization of private liquor sales a response to a duty under which, like the furnishing of police and fire protection or a marriage license, a State is required by law or tradition to furnish to every one of its citizens.[5] Thus, the State of Pennsylvania would be required to permit a speaker, in exercise of his First Amendment rights, to use a public hall even if that speaker sought to advocate separation of the races. And the State would be required to furnish police protection to every individual or group regardless of their private beliefs or predilections.

But the State is not required by law to authorize or provide the economic support for an individual or group by permitting the sale of liquor. *Amicus* submits that the State is precluded by the Equal Protection Clause from such an authorization where its effect would be to sustain racial discrimination.

---

[4] The rationale of *Palmer* v. *Thompson*, *supra*, serves as a useful analytical tool for recognizing this distinction.

[5] See, e.g., *Loving* v. *Virginia*, 388 U.S. 1, 12 (1966).

CONCLUSION

The judgment of the District Court should be affirmed. The grant by the State of Pennsylvania to Moose Lodge No. 107 of a club liquor license was in violation of the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

JOHN T. RIGBY
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae
Lawyers' Committee for
Civil Rights Under Law